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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1440

EDWARD W. MAHER, COMMISSIONER OF SOCIAL SERVICES OF THE STATE OF CONNECTICUT,

Appellant,

v.

SUSAN ROE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLEES

LUCY V. KATZ
Koskoff, Koskoff, Rutkin & Bieder
1241 Main Street
Bridgeport, Connecticut 06604

KATHRYN EMMETT
Koskoff, Koskoff, Rutkin & Bieder
1241 Main Street
Bridgeport, Connecticut 06604

ANN HILL
33 Whitney Avenue
New Haven, Connecticut

CATHERINE RORABACK
265 Church Street
New Haven, Connecticut

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BRIEF OF APPELLEES

STATEMENT OF THE CASE

The three judge district court in this case has declared unconstitutional and enjoined the enforcement of a regulation of the Connecticut Department of Social Services prohibiting Medicaid, or state medical assistance, for elective abortions and requiring prior

authorization and the prior consent of the patient for any abortion for which medicaid reimbursement is sought. The challenged regulation,[1] set forth in full in the Joint Appendix at 7, provides that medicaid shall be available for abortion services only when the abortion is "medically necessary." When a medicaid recipient seeks to obtain abortion services, the following must occur:

1. The hospital or clinic where the abortion is to be performed must submit in advance a request for certification for reimbursement for abortion (Form W-217, A. 47), which reads:

> "I hereby certify that (name of patient) has requested performance of an abortion. She is in the first trimester of her pregnancy. As attending physician it is my opinion that performance of this abortion is medically necessary for the patient's health. This abortion will be performed at (hospital) on (date)."
>
> s/ Attending Physician[2]

[1] §275, Connecticut State Department of Social Services, Medical Assistance Program, Manual, Vol. 3, Chapter III. This regulation is promulgated as part of Connecticut's medical assistance program, for which the State is partially reimbursed by the federal government under 42 U.S.C. §1396 *et seq.*, or Title XIX of the United States Social Security Act. All persons eligible for Aid to Families with Dependent Children (AFDC) are eligible for medicaid. 42 U.S.C. §1396(a).

[2] For second trimester abortions, the Chief of Obstetrics and Gynecology must certify that the abortion will be performed in a hospital and that the attending physician is privileged to practice at that hospital. Form W-217a. This part of the regulation is not now before the Court. cf opinion below. 408 F. Supp. 660, 665 fn. 6 (D. Conn. 1975) Memorandum of Decision, Juris. Statement, 18 at 25.

2. The hospital must submit in advance a Request for Authorization for Professional Services, Form W-601. (A. 45) This form must "include a statement indicating the medical need for the abortion." §275. (A. 8) Both forms, plus the written request of the patient are sent to the Department of Social Services.

> ". . . [T]he request will be reviewed by competent medical authority in the Division of Health Services in Central Office, and the hospital or clinic will be notified of the Department's decision by returning two (2) copies of Form W-601 to the hospital, maintaining one (1) copy for its own files."

§275. (A. 8) Payment for abortion will be made only when this prior authorization is obtained from the Chief of Medical Services, Division of Health Services, Department of Social Services. §275, (A. 7)

There is no medical service other than abortion for which the defendants require a certification of medical necessity signed by the attending physician and the Chief of Service. (Ans. to Plaintiffs' Interrog. 9B). Forms W-217 and W-217a are unique to abortion. Nor is there any other service for which a physician is required to certify in advance that a patient has requested or consented to treatment. Similarly, there is no other procedure for which a chief of staff must certify to an attending physician's hospital privileges.

As part of its medicaid program, Connecticut provides comprehensive pre-natal, obstetrical and post-natal care for pregnant eligible recipients. For these services, and generally for the vast majority of physicians' and hospital services paid for by medicaid, a physician or hospital performs the services, and subsequently submits a form W-285, (A. 46) stating the services rendered, the diagnosis

and the fee. No prior authorization is required for any form of reproductive health care, or other pregnancy-related disability, aside from abortion.[3]

Nor is it required for any hospital procedure requiring a stay of less than ten days nor for any surgical

[3]Prior authorization is required only for certain services which involve long term treatment, are extremely costly, or are rehabilitative or custodial in nature:

(1) Dental care other than emergency care or routine low-cost care in a state-aided hospital clinic. Manual Vol. 3 Ch. III §215.

(2) Drugs costing over $10.00 and certain multi-vitamins. Manual §217.2(3).

(3) Prosthetic, surgical and orthopedic applicances and sickroom supplies costing over $5.00. Manual §220.11.

(4) Hearing aids and aural rehabilitation. Manual §222.

(5) Non-emergency transportation by ambulance, chair-car or taxi. Manual §223.

(6) Day treatment services. Manual §265.

(7) Certain services for the mentally retarded. Manual §270.03.

(8) Certain unusual optometric services. Manual §280.

(9) Podiatry services. Manual §280.1.

(10) Physical therapy services. Manual §282.

(11) Public health nursing services. Manual §282.

(12) Home Health Aid Services, over 12 hours a week. Manual §229.13.

(13) Hemodialysis. Manual §230.

(14) Psychological tests and treatment and diagnostic services. Manual §252.

(15) Care in certain voluntary non-profit clinics. Manual §253.

(16) Special nursing services. Manual §301.43.

(17) Out-of-state hospitalization. Manual §302.

(continued)

procedures except transplant and cosmetic surgery, which are understandably *sui generis*. In their answers to interrogatories defendants claimed that prior authorization is required for a tubal ligation, (Ans. to Interrog. 10A.4), but this requirement is not documented in any of the regulations furnished in response to said interrogatories. (Ans. to Interrog. 10D). As the Affidavit of Sandra Sereque (A. 44) points out, reimbursement for tubal ligation is provided when W-285 is submitted subsequent to the operation and without any request for prior authorization.

Connecticut also provides comprehensive family planning services under 42 U.S.C. §1397 *et seq.*, Title XX of the Social Security Act. Abortion is now currently being provided under this section, which carries a higher rate (90%) of federal reimbursement for state expenditures than does Title XIX. Yet no prior authorization or proof of necessity is required for any other birth control or contraceptive service. (Ans. to Interrog. 10A.8)

Plaintiff-appellees are all women who do not themselves have the funds to obtain abortion or any other medical services. As recipients of public assistance they must look

(footnote continued from preceding page)

(18) Certain private psychiatric treatment. Manual §315.

(19) The following physician's services:

Psychiatric services
Audiological services
Orthopedic treatment
Physical therapy
Hemodialysis

Special procedures:

Transplant operations
Cosmetic or Reconstructive surgery
Chemotherapy

to government agencies for the costs of medical care. A class of pregnant women eligible for medicaid who have been refused payment for abortions which they have requested and which have been approved by their physicians, was certified by the District Court, 388 F. Supp. at 730. (Memorandum of Decision. Juris. Statement at 25.)

Plaintiff Susan Roe was pregnant when the action was originally filed. She was unmarried and the mother of three children. One of these was a six month old boy who was in poor health. Ms. Roe felt she could not adequately care for both an infant and her son, who required careful supervision lest he become ill. Affidavit in Support of Motion for Temporary Restraining Order, (A. 20-21). Plaintiff Roe's physician, Dr. James Kauders, did not submit an attestation of medical necessity, because "[He did] not believe [an abortion] is medically necessary in the sense that her life or health will be threatened if the abortion is not performed." Affidavit in Support of Motion for Temporary Restraining Order. (A. 22-23).

Plaintiff Poe was sixteen years old and a high school junior when she became pregnant in September, 1973. She was in excellent health, and she desired an abortion so that she could complete high school, obtain a job, and terminate her dependence on public assistance. Affidavit in Support of Motion for Temporary Restraining Order. (A. 24-25) and Affidavit of Linda Poe, (A. 49-50). She underwent an abortion at Park City Hospital in Bridgeport, Connecticut, but the State Welfare Department refused to authorize medicaid payment for that procedure. Plaintiff Poe's mother attempted to pay for the abortion but could not because she herself was dependent upon Aid to Families with Dependent

Children. When this action was commenced she owed the hospital $244.20. This plaintiff has since entered Sacred Heart University and obtained part-time employment. (A. 50) Park City Hospital tried to obtain prior approval for Plaintiff Poe's abortion from the Department of Social Services and approval was denied. Affidavit of Sandra Sereque, Manager of Patient Accounts, Park City Hospital. (A. 39-40)

Plaintiff Barbara Bye was eighteen years old, divorced, and had a two and one-half year old daughter when she asked for a temporary restraining order to obtain an abortion under medicaid. She and her daughter were completely dependent on public assistance from the State of Connecticut for all of their needs. She was in her sixth week of pregnancy and did not wish to bear an illegitimate child, but there was no medical reason why she should not carry her pregnancy to term. Affidavit of Barbara Bye. (A. 26-27) Ms. Bye consulted Dr. James Kauders, who concurred in her decision to undergo an abortion, but informed her that he could not certify that the abortion was necessary for her health, that, therefore, medicaid would not pay the costs, and that she would have to pay the full costs of confinement in Park City Hospital and of his services before he could perform the operation. Affidavit of James Kauders, M.D. (A. 28-29)

Plaintiff Carol C. was eight weeks pregnant when she consulted Dr. Eugene Corley of Bridgeport and requested that he perform an abortion. She was divorced, and the mother of three children, ages 6, 7 and 9. For the past year she had worked as a visiting nurse's aid and was attempting to complete her nursing education so that she could end her dependence on public assistance. With a new infant to care for, she would have had to leave her job and postpone her further education for several years.

Affidavit of Carol C. (A. 30) Dr. Corley concurred in her decision to undergo an abortion, but indicated that he could not schedule her for one until she found some means of payment independent of medicaid. In his affidavit, Dr. Corley stated that:

> "I cannot certify to the Department of Social Services that Ms. C's abortion is medically necessary to her health, without violating medical ethics."

Affidavit of Eugene Corley, M.D. (A. 32-33)

Plaintiff Debbie D. also consulted Dr. Eugene Corley and discovered she was pregnant. She was unmarried and had a six month old child. A student at Bassick High School in Bridgeport, she was attempting to finish high school while caring for her young child. She could not have done so with another infant to care for. Affidavit of Debbie D. (A. 34-35) Dr. Corley found that there would be no danger to Ms. D's health in carrying her pregnancy to term, so that he could not certify to medical necessity. Affidavit of Eugene Corley. (A. 32-33)

Both Dr. Kauders and Dr. Corley stated by Affidavit that they could not certify to medical necessity unless a full term pregnancy would involve some unusual danger to the health of the patient. Dr. Joseph Horowitz, Chief of Obstetrics and Gynecology at Park City Hospital, with which both Dr. Kauders and Dr. Corley are affiliated, also gave an affidavit in support of plaintiffs' first Motion for Summary Judgment. In it he said:

> "[5] It is my professional opinion that the terms "medically necessary . . ." and "medically necessary for the patient's health . . ." refer to situations in which the attending physician believes there will be an adverse effect upon the physical or mental condition of the patient if the pregnancy is carried to term."

> "[6] When a patient determines that she does not wish to bear a child for personal reasons, and there is no medical reason why she should not carry her pregnancy to term, I cannot attest that an abortion is medically necessary for the patient's health, without violating my professional code of ethics."
>
> "[7] I will, therefore, not fill out forms W-601, W-217 or W-217a in a case where a patient desires an abortion only for personal or family planning reasons, and I would instruct members of my staff not to do so in similar circumstances."
>
> "[8] An abortion for family planning reasons is, of course, medically necessary in order to terminate an unwanted pregnancy, in the same sense as other forms of obstetrical care are medically necessary when a patient decides to carry a pregnancy to term."

Affidavit of Joseph Horowitz, M.D. (A. 16-38)

All three physicians stressed in their affidavits that an abortion should be performed as early in pregnancy as possible since the risks to the patient increase as the fetus develops. It is, therefore, standard medical procedure to perform an abortion whenever possible before the twelfth week of gestation, and in any case as early as possible. Abortion is an emergency procedure if the woman is close to or beyond the twelfth week of pregnancy – and, in practice, legal abortions at Park City Hospital are scheduled within a few days of a staff member's request. However, when the patient is a public assistance recipient, the hospital informs her that the State will not reimburse it for her abortion and that she must, therefore, find some other means of payment. Affidavit of Sandra Sereque. (A. 39-40) The abortion is then either put off entirely, delayed while the patient attempts to borrow the necessary funds, or performed

by non-licensed non-medical person, at great risk to the patient.

Mrs. Sereque also indicated, by affidavit, that there was an average time lapse of two weeks between her submission of request for prior authorization and the return to her of the response of the Department of Social Services. (A. 40) Four physicians stated in affidavits that abortion must be performed as early in pregnancy as possible, because the risk of complication increases with each day. The delay imposed by the prior authorization requirement thus interferes *per se* with good medical practice. Affidavits of Gordon Jonas, M.D., (A. 63 at 65), Eugene Corley, M.D., (A. 60 at 61-2), Joseph Horowitz, M.D. (A. 56) and James Kauders, M.D. (A. 22-23) and (A. 28-29)

SUMMARY OF ARGUMENT

Connecticut provides a comprehensive public assistance program; as a part of that program it provides medical assistance to the indigent, or 'medicaid'; as part of that medicaid program it provides medical assistance for all pregnancy-related care; and as part of that medicaid program it provides medical assistance for therapeutic abortions.

By conditioning the receipt of medicaid payments on the patient's decision to forego elective abortion, the state has created a disfavored class of persons, consisting of medicaid-eligible women who seek to exercise their fundamental constitutional right to abortion as enunciated in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973). The state imposes a burden upon that class and interferes

with the exercise of that right. The state cannot condition the receipt of government benefits so as to penalize those who exercise a fundamental right. *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1954). As the court below found:

> When Connecticut refuses to fund elective abortions while funding therapeutic abortions and pre-natal and post-natal care, it weights the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion.

408 F. Supp. at 663, Memorandum of Decision, Juris. Statement at 20.

By requiring prior authorization from the Department of Social Services, the state further interferes with the abortion decision in contravention of *Doe v. Bolton, supra*. The attending physician is forced to delay, for approximately two weeks, a procedure which should be performed as early in pregnancy as possible. The risks to the women are thus increased, and some women must delay abortion until the more dangerous second trimester of pregnancy. Additionally, the prior authorization requirement means that a third person reviews the attending physician's medical judgment as to the need for the abortion.

No sufficient state interest has been asserted by the appellant to justify the infringement of the exercise by the appellees of their rights. The state claims that it conserves public funds by not paying for elective abortions. As this court has said in *Memorial Hospital v. Maricopa County, supra* at 263, "conservation of the taxpayer's purse" is not a compelling state interest where fundamental rights are concerned. Additionally,

abortion is the least expensive form of pregnancy related care, and the state does not dispute this.

Nor has the state advanced any sufficient interest to justify its requirement for prior approval of the abortion. The appellant has never indicated why such a requirement is necessary for abortion and not for all the other forms of comparable care, which are reimbursed upon application of the physician after services are rendered. The state claims that it never questions the judgment of the attending physician when it rules on requests for authorization, yet the regulation clearly does require the Department to review the judgment of the physician. Moreover, if there is in fact no such review, there can be no justification for the requirement in the first place.

The state has in reality made a moral or political judgment that it should not pay for elective abortion. Such a judgment is not a compelling interest; it does not even form a rational basis for the burdens imposed by this regulation.

The District Court held that Connecticut could not impose any requirement for medicaid payment for abortion which is not "equally applicable to medicaid payment for child birth." 408 F. Supp. at 665. Juris. Statement at 23. Plaintiffs ask that this holding be affirmed, because it is consistent with prior decisions of this court and with the protection of the fundamental rights of the plaintiff class.

ARGUMENT

I.

THE STATE CANNOT DENY PUBLIC ASSISTANCE TO THOSE WHO CHOOSE TO EXERCISE A CONSTITUTIONAL RIGHT

The right of a pregnant woman to determine whether to terminate her pregnancy, is grounded in the right to privacy and to personal liberty. *Roe v. Wade, supra* at 177. At least during the first trimester of pregnancy the women's right to make that determination, with her physician, is fundamental, and may not be infringed by the state absent a compelling state interest. *Id.* at 178, 182-3.

That the withholding of public benefits can constitute an unwarranted interference with Constitutional rights is now beyond debate. This court has said that benefits may not be denied to those exercising the right to travel, in *Shapiro v. Thompson* and *Memorial Hospital v. Maricopa County, supra.* These cases are particularly in point because they concern a right which, like abortion, is founded in the concept of personal liberty rather than in any explicit Constitutional provision. In *Shapiro,* the state had imposed a one-year residence requirement for AFDC eligibility. *Shapiro* was extended to apply to medical care in *Memorial Hospital.* That case struck down an Arizona statute requiring one year's county residence as a condition of receiving non-emergency public medical care. Both cases stress that the challenged regulation need not necessarily prevent the exercise of a Constitutional right. The law prohibits as well a penalty imposed upon persons who assert the right in question.

394 U.S. at 629-630, 415 U.S. at 257. See also *Dunn v. Blumstein*, 405 U.S. 330, at 339-340:

> In *Shapiro* we explicitly stated that the compelling state interest test would be triggered by any classification which serves to *penalize* the exercise of that right. (emphasis in original)

and *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-35. (1973)

This case is not about the right to receive medical benefits, as appellants insist. (*Memorial Hospital* refers to medical care as a "basic necessity of life," 415 U.S. at 259, yet the court declined to base its decision on the right to such care.) The case at bar is rather about the state's ability to use a public benefit program to penalize the exercise of a fundamental right. The impermissibility of such manipulation has been manifested by this court at least since *Sherbert v. Verner*, 374 U.S. 398 (1963), held that South Carolina could not deny unemployment compensation to a Seventh Day Adventist who was unemployed because her religious beliefs prevented her from working on Saturday.

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. *Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.* (emphasis added)

374 U.S. at 404. It would, in fact, be inconceivable for a state to deny a government benefit to anyone because of the way in which one exercises First Amendment Rights, either as to religious preference or political or moral persuasion. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), *Speiser v. Randall*, 357 U.S. 513 (1958). All of the cases cited require a compelling state interest to justify such restrictions.

In none of the cited cases was the state being asked to pay for the exercise of the fundamental right involved. In the first amendment area, in fact, any such notion might well run afoul of the Establishment clause. Similarly, plaintiffs do not contend that the state must pay for abortions simply because it is a women's right to terminate her pregnancy. Nevertheless the state cannot deliberately condition the receipt of medical benefits upon the recipient's willingness to forego the exercise of that right.

II.

THE STATE DENIES EQUAL PROTECTION OF THE LAWS WHEN IT REFUSES MEDICAID PAYMENT FOR ELECTIVE ABORTION

By singling out pregnant women who choose abortion and restricting them from medicaid reimbursement, the state is in fact creating a disfavored class, in violation of the equal protection clause of the Fourteenth Amendment. *Smith v. King*, 392 U.S. 309, 312, fn. 4 (1967).

Plaintiffs are members of a disfavored class in respect to three separate considerations: (1) plaintiffs are

denied reimbursement for a legitimate medical expense necessitated by their pregnancy because they have made a morally disfavored choice, abortion, while women who, as the state would wish them to, choose to carry pregnancy to term are granted medical assistance for all pregnancy-related care. Defendants answers to interrogatories admit that no other form of obstetrical care requires prior authorization or proof of medical necessity: (2) They are denied the right to choose an abortion solely because of their indigency. Women who can afford the necessary medical care can obtain abortions subject only to restrictions permitted under *Roe v. Wade*, supra: (3) Plaintiffs are required to undergo the burdensome and time-consuming procedure of obtaining prior approval of a service authorized by their physicians. Such approval is not required for any other hospital procedure, nor for any comparable physician's care. See statement of facts, *supra*. Moreover, *no* other medical procedure requires any certification of medical necessity or certification as to the place of treatment and the operating privileges of the attending physician.

The regulation at bar creates a classification of indigent women who choose to undergo abortion rather than bear an unwanted child. An indigent woman faced with an unwanted pregnancy is forced by the State to choose the acceptable method of dealing with her condition: having the baby. A fundamental right is conditioned totally on the ability to pay, and so is negated altogether for plaintiff's class. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

> [A protected right] . . . must be protected against denial by particular laws that operate to jeopardize it for particular individuals. 401 U.S. at 379-380.

The administrative requirements for abortion reimbursement further single out all indigents who choose abortion rather than other forms of care and create obstacles which at best place unnecessary burdens on that choice and at worst deny persons making said choice the medical care they require. The Court below stated:

> The Constitution does not require the state to pay for any medical services at all. Nevertheless once a state chooses to establish a program for reimbursing the medical expenses of the indigent, and adopts as part of that program a provision that requires state funding for medical expenses arising from pregnancy. A serious equal protection issue arises if the state refuses to reimburse expenses incurred in procuring an abortion.

408 F. Supp. at 663, Memorandum of Decision, Juris. Statement 18 at 20. If Connecticut did not provide any public assistance for medical expenses connected with pregnancy, then the appellant's argument that there is no invidious discrimination would have greater credence. That was the case in *Geduldig v. Aiello*, 417 U.S. 484 (1974). *Geduldig* found no violation in California's disability insurance program which provided no coverage for pregnancy-related disabilities. *Geduldig* found that the state's substantial interest in excluding coverage for pregnancy justified the classification. The risk of pregnancy was outside the coverage of the statute. In the case at bar, the condition of pregnancy is within the scope of mandatory coverage. The exclusion falls only on those who make a disfavored choice in the treatment of pregnancies.

> Here, as in Shapiro and Maricopa County, we deal with governmental benefits for indigents. Here we deal with a particular subclass of indigents, those

who are pregnant. Here, as in Shapiro and Maricopa County, those indigent pregnant women who exercise a right protected by the constitution i.e., to have an abortion, are denied the governmental benefit solely as a consequence of the exercise of that right. Accordingly, in reliance on Roe, Shapiro and Maricopa County, we hold that although an indigent pregnant woman may not have a fundamental right to require the government to subsidize an abortion, where the state so classifies as to deprive particular indigents of the benefits otherwise available, as a consequence of their exercise of a fundamental right, the state legislation must be measured by the compelling state interest test and the state must demonstrate that its classification scheme promotes a legitimate governmental objective.

Planned Parenthood Assoc. v. Fitzpatrick, 401 F. Supp. 554, 581 (E.D. Pa. 1975) vacated and remanded *sub nom Beal v. Franklin*, 44 U.S.L.W. 3758. A majority of the lower federal courts have applied the foregoing analysis and concluded that the state may not deny payment for abortion, or otherwise place burdens or restrictions on the abortion decision which are not applied when a woman chooses to carry a pregnancy to term. *Doe v. Rose*, 499 F. 2d 1112 (10th Cir. 1974); *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974) aff'd *sub nom Singleton v. Wulff*, ____ U.S. ____ 49 L. Ed 2d 826 (1976); *Doe v. Westby*, 383 F. Supp. 1143 (D.S.D. 1974) rem. in light of *Hagans v. Lavine, sub nom Westby v. Doe*, 420 U.S. 968 (1975) dec. on rem., 402 F. Supp. 140 (W.D.S.D. 1975); *Doe v. O'Bannon*, No. 4-74 Civ. 69, (D. Minn. August 1, 1975); *Doe v. Wohlgemuth*, 376 F. Supp. 173 (W.D. Pa. 1973) aff'd *sub. nom. Doe v. Beal*, 523 F. 2d 611 (3d Cir. 1975) cert. granted 49 L. Ed 2d 1216 No. 75-554 (1976),

Klein v. Nassau County Medical Center, 374 F. Supp. 496 (E.D. N.Y. 1972) rem. in light of *Wade* and *Bolton*, 412 U.S. 924 (1973); dec. on rem. 409 F. Supp. 731 (E.D. N.Y. 1976) *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973) *Doe v. Myatt*, No. 4-74- Civ. (D. Minn. August 1, 1975).

In a closely related line of cases, the courts have consistently struck down any refusal by a public hospital to perform abortion. *Orr v. Koefoot*, 377 F. Supp. 673 (D. Neb. 1974); *Nyberg v. City of Virginia*, 495 F. 2d 1342 (8th Cir. 1974) app. dism., cert. den. 419 U.S. 891 (1974); *Doe v. Poelker*, 497 F. 2d 1063 (8th Cir. 1975) cert. granted 49 L. Ed 2d 1216 No. 75-442 (1976); *Doe v. Hale Hospital*, 500 F. 2d 144 (1st Cir. 1974) cert. den. 420 U.S. 907 (1975) and see *Hathaway v. Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973) (barring public hospital's ban on voluntary sterilization) *Doe v. Mundy*, 514 F. 2d 1179 (7th Cir. 1975), *Doe v. Ceci*, 517 F. 2d 1203 (7th Cir. 1975). These cases hold that a city which provides general medical care to the community may not refuse to provide the care necessary for abortion.

Any regulation of places where abortions are to be performed is invalid when it is different from that applied to other forms of medical care, cf. *Doe v. Bolton, supra.* This includes simple requirements that a facility be licensed, that the names and addresses of owners and personnel be disclosed and other administrative regulations. *Word v. Poelker*, 495 F. 2d 1349 (8th Cir. 1974); *Friendship Medical Center v. Chicago Board of Health*, 505 F. 2d 1141 (7th Cir. 1975) cert. den. 420 U.S. 997 (1975) *Hodgson v. Anderson*, 378 F. Supp. 1008 (D. Minn. 1974); *Hallmark Clinic v. North Carolina*, 380 F. Supp. 1153 (D.N.C. 1974).

> "Because we cannot say that this extra layer of restriction placed upon abortion is legitimately related to the recognized objectives of state regulations and further because the ordinance employs limitations that unduly penalize those patients who seek and those doctors who choose to perform abortions, we find it necessary to strike down ordinance No. 56579 in its entirety."

Word v. Poelker, 495 F. 2d at 1352.

III.

CONNECTICUT IMPOSES A SIGNIFICANT BURDEN ON WOMEN WHO CHOOSE ELECTIVE ABORTIONS, WHICH IS PERMISSIBLE ONLY TO FURTHER A COMPELLING STATE INTEREST

From the recent decisions of this court, a two-fold test emerges as to the constitutionality of post-*Wade* abortion regulations. In *Planned Parenthood of Central Missouri v. Danforth*, ____ U.S. ____ 49 L. Ed. 2d 788 (1976) the court considered Missouri's requirements as to patient, spousal and parental consent for abortion, medical procedures to be used in abortion and in caring for an aborted fetus, definitions of viability and certain record keeping and reporting requirements. As to each component of this statute the court examined its actual impact on the abortion decision. Thus the court found a ban on the use of saline abortions "an unreasonable or arbitrary regulation designed to inhibit and having the effect of inhibiting the vast majority of abortions after the first 12 weeks." Spousal and parental consent requirements were struck down because they allowed a person other than the woman or her physician to veto

the abortion. *Bellotti v. Baird*, ____ U.S. ____ 49 L. Ed 2d 844 (1976). The court reiterated its inquiry as to whether a given requirement "unduly burdens the right to seek an abortion," Id. at 856. The District Court below anticipated this concept when it held that

> "No state regulation of medicaid payments for abortion is permissible . . . If such conditions or requirements tend to discourage a woman from choosing an abortion or to delay the occurrence of an abortion that she has asked her physician to perform."

408 F. Supp. at 665, Memorandum of Decision, Juris. Statement at 23.

Once there is such a demonstrated burden on the abortion decision, the state must show a compelling interest to justify that burden, under *Roe v. Wade, supra, Doe v. Bolton, supra, Shapiro v. Thompson, supra* and *Sherbert v. Verner, supra.* The rational basis standard, and cases such as *Dandridge v. Williams*, 397 U.S. 471 (1970) and *Jefferson v. Hackney* 406 U.S. 535 (1972) are inapplicable. Those cases deal only with the right to receive public assistance funds. Neither involved a "direct effect . . . upon the exercise of a constitutionally protected right." *Roe v. Norton, supra*, 408 F. Supp. 663, Memorandum of Decision, Juris. Statement at 20.

A. Defendants Cannot Require That an Abortion be Necessary to the Patient's Health

Under defendants' regulation, only "therapeutic abortion services within the state are covered under Title XIX." The abortion must be recommended as "medically necessary for the patient's health" by the

attending physician who must indicate in the request for prior authorization the reasons why the service is necessary.

Whatever the exact definition of "medically necessary for the patient's health," there can be no doubt that §275 is meant to exclude payment for some types of abortions. Otherwise there could be no conceivable reason for enacting the regulation. Moreover, these excluded abortions are protected by *Roe v. Wade* and *Doe v. Bolton, supra.*[4] Plaintiffs' physicians all stated, by affidavit, that they did not believe these abortions to be medically necessary to their patients' health.

> "I find no medical or other reason why this abortion should not be performed; however, there will be no danger to Ms. C's health should she carry her pregnancy to term.
>
> I cannot certify to the Department of Social Services that Ms. C's abortion is medically necessary to her health, without violating medical ethics."

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[4] *Roe v. Wade, supra,* differentiates between abortions which may be detrimental to "mental or physical health" and those which, for other reasons, may cause distress or hardship for the mother and other members of her family. 410 U.S. at 153. And see Justice Berger's concurring opinion:

> The vicissitudes of life produce pregnancies which may be unwanted, or which may impair 'health' in the broad *Vuitch* sense of the term, or which in the full setting of the case may create such suffering, dislocations, misery, or tragedy as to make an early abortion the only civilized step to take. These hardships may be properly embraced in the 'health' factor of the mother as appraised by a person of insight *or they may be part of a broader medical judgment based on what is 'appropriate' in a given case, though perhaps not 'necessary' in a strict sense."*
>
> 410 U.S. at 216.

Affidavit of Eugene Corley, M.D. (A. 32, 33) See also Affidavits of Joseph Horowitz, M.D. (A. 36-37), James Kauders, M.D. (A. 22 and A. 28) and Affidavit of Gordon Jonas, M.D. (A. 64). Both Dr. Jonas and Dr. Corley also stated in their affidavits that the large majority of abortions which they performed were for family planning reasons. (A. 64, A. 62)

> The large majority of my patients request abortions for economic reasons; an unwanted child would cause great financial hardship for them or their families.
>
> Many of my patients are struggling to build a better life for themselves and their families and an unplanned pregnancy can ruin any chance they have of breaking the cycle of poverty.
>
> Women in this situation can, of course, carry a pregnancy to term and care for another child without any change in their psychological condition or their physical health.

Affidavit of Eugene Corley, M.D. (A. 62)

Perhaps not all physicians share these ethical scruples against certifying medical necessity where none exists. Section 275 does, however, require a statement of specific medical need, on Form W-601 (A. 45). Moreover as Dr. Jonas pointed out to the court:

> It is common knowledge that the overwhelming majority of abortions are performed as a family planning technique and not because of any danger to the physical or mental health of the mother;
>
> . . .
>
> I have consistently refused to perjure myself and claim medical necessity when none, in fact, exists;
>
> It seems to me to be highly undesirable for the welfare department to ask physicians to lie about their reasons in order to give their patients the care they need.

Affidavit of Gordon Jonas, (A. at 64) Nor should medicaid patients be forced to search for a physician who is willing to sign the proper papers, before they can obtain medical care.

Many medicaid-eligible women never even consulted physicians for abortions because they believed the state would not pay. In September of 1975, appellants sent a notice to all recipients stating that abortion would be reimbursed for a recipient:

> "Whose physician signs and submits to the Department a written statement indicating the medical need for the abortion which request the Department must approve . . ."

See Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, p.10. The result was that many women simply assumed they would be ineligible for abortion reimbursement. Affidavits of persons regularly dealing with medicaid recipients in need of obstetrical care confirm this. See Affidavits of Patricia Trunstall, (A. 68) Mary Hennessy, (A. 69) and Betty Carrion, (A. 71)

> "Since August 20, 1975 I have received many calls from women who believe that medicaid will not provide payment for abortion services.
>
> These women indicated to me that the State will not pay for abortions and often refer to a notice sent to them with their monthly Aid to Families With Dependent Children checks, stating that abortions must be medically necessary.

Affidavit of Mary Hennessy. (A. 69)

The appellant contends that it does not pay for non-medically necessary abortions because Connecticut provides medicaid payment only for services which are

medically necessary to the patient's health. Brief of Appellant, p. 11. It is impossible, logically or Constitutionally, to apply this policy to pregnancy. For a pregnant woman, some medical service is always necessary. If she choose abortion, further obstetrical care becomes "unnecessary for her health." Of course, neither the plaintiff nor the state claims that obstetrical care for full term pregnancy is unnecessary.

> Pregnancy is a condition which in today's society is universally treated as requiring medical care, pre-natal, obstetrical and post partum care, and undeniably it is provided under the medicaid program as 'necessary' medical assistance although pregnancy is not an abnormal condition nor does the medical assistance in childbirth 'cure' it. Medical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance.

Klein v. Nassau County Medical Center, supra, 347 F. Supp. at 500.

This court in *Doe v. Bolton* addressed the validity of a Georgia requirement "based upon his [the physician's] best clinical judgment that an abortion is necessary." 410 U.S. at 191. The court upheld this requirement, making it clear that

> the medical judgment must be exercised in the light of all factors – physical, emotional, psychological, familial and the woman's age – relevant to the well-being of the patient.

410 U.S. at 192. The District Court in *Doe* had stricken from the statute the requirement that the abortion be necessary to avoid danger to life or permanent injury to health. Thus the valid necessity requirement in *Doe*

does not restrict the physician to a finding of necessity for health. It accepts the fact that there may be abortions which are unnecessary in the sense that the woman is not pregnant, or which are contraindicated because of a particular patient's physical condition. In all other situations, there really is no 'unnecessary' abortion, presuming the patient wishes to terminate her pregnancy.

The decision in *Doe v. Bolton* must, moreover, be read in the context of the court's insistance that the abortion decision be made by the patient in accordance with her own physician's best clinical judgment. Thus *Doe* struck down the requirement that abortion be approved by a hospital review committee. 410 U.S. at 197-198. That requirement served no reasonable state interest and there was no "other surgical procedure made subject to committee approval as a matter of state criminal law." *Id.* at 197.

Similarly, Connecticut manages to protect its asserted interest in providing medically necessary care in virtually all other comparable situations, without any special certification of necessity. There has never been any claim by the State of Connecticut as to why abortion requires greater vigilance than any other pregnancy related care in order to insure that the service is necessary. On the contrary, the state attempts to show that it does not, in fact, question the judgment of the attending physician. The state is claiming a compelling interest in determining medical necessity, by means of a procedure which admittedly does nothing to aid in the determination of necessity.

The state also asserts a concern that if it must constitutionally pay for abortion it will also be forced to pay for elective procedures such as cosmetic surgery.

As the District Court noted, this contention is without merit because "in declining to pay for these procedures, the state is discouraging the exercise of any constitutional right." 408 F. Supp. at 665. Memorandum of Decision, Juris. Statement at 22. The state does not presume to pay for the conditions leading to such elective surgery. The state can, if it chooses, refuse to pay for treatment of any particular *condition*, because there is no constitutional right to any state-funded medical care. It simply cannot discriminate between treatments relative to a particular condition in a way which interferes with the woman's right in consultation with her physician to make a constitutionally protected decision.

The state asserts a fiscal interest in excluding elective abortion from medicaid, in that the exclusion serves to conserve limited fiscal resources.

> First, a state may not protect the public fisc by drawing an invidious distinction between classes of its citizen.

Memorial Hospital v. Maricopa County, supra at 263, citing *Shapiro v. Thompson, supra* at 633. The District Court rejected this interest not only as not compelling, but as 'wholly chimerical' 408 F. Supp. at 664 Memorandum of Decision, Juris. Statement at 21. The Court found as a fact that abortion is the least expensive response to pregnancy. Absent abortion, the state bears the far more expensive cost of prenatal and post-natal care for the mother, full hospital obstetrical services for delivery, and hospital charges for the newborn. Of course, in most cases the state then provides for the child under its AFDC program. This finding is based on the record and not disputed, in spite of appellant's statements in his brief at Page 24. The

Court had before it the entire Medical Assistance Program Manual, and the Relative Value Scale of Physicians Services and Procedures and Diagnostic Codes. It was also undisputed that medicaid eligibility is dependent on the eligibility of the family for AFDC. The Court was therefore well aware of what funds the State would be obligated to provide if the plaintiffs did not obtain abortions, and the cost of these other expenses relating to childbirth is several times the cost of abortion. Even under the more stringent equal protection test used by the courts when only state fiscal policies are at stake, *Dandridge v. Williams, supra; Jefferson v. Hackney, supra* or the intermediate test based on *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) and *Reed v. Reed*, 404 U.S. 71 (1971), the state herein has not justified the discriminatory impact of Section 275.

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation." *Reed v. Reed*, 404 U.S. at 76.

Appellants object to the District Court's holding that the state cannot limit funds for abortion which it finds 'morally objectionable.' The record before the court contained examples of statements by the Governor of Connecticut indicating that social and moral judgments were indeed behind the enactment of this regulation. In July, 1976, when the defendant herein was questioned as to whether §275 cost the state extra money, he replied, "The State has not studied short and long run costs. The cost is less important that the major moral issue of whether the state should provide abortions to those who want them." *New Haven Journal Courier*, July 7, 1976, P. 1. A similar attitude is expressed in the

Amicus Curiae brief of the State of New Jersey.[5] That brief basically argues that a state has an interest in creating a welfare program "socially and politically" acceptable to the people of the state, and that this interest satisfies at least the rational basis test. No party to this litigation denies the politically sensitive, indeed explosive, nature of the abortion issue. However, if New Jersey's views were to prevail, the result would be the subjugation of the Constitution to the perceived prejudices of the electorate. The views of one religion or other group would be 'established' in violation of the first amendment, and the way would be open for legislation penalizing particular minority religious or political ideas. Such a result would subvert the very basis of Constitutional government. As we are reminded by Professor Franz:

> Let us note that any constitutional limitation serves as significant function only insofar as it stands in the way of something which the government thinks ought to be done. Nothing else needs to be prohibited.
>
> Franz, The First Amendment In the Balance, 71 Yale, L.J. 1424, 1444 (1962).

B. Defendants Cannot Require Prior Authorization for the Performance of an Abortion

As noted in the Statement of Facts, supra, defendants have placed abortion in a special category of medical services which require prior approval or

[5] Permission for filing this brief was never requested by New Jersey, as is required under Rule 42 of the Supreme Court Rules. Appellees therefore object to its consideration by the court.

authorization before a provider of services can obtain reimbursement. As also noted, medical personnel in the Division of Health Services review the reason for the abortion and either approve or disapprove it. Like the review requirements at issue in *Doe v. Bolton,*

> The woman's right to receive medical care in accordance with the licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed review.

410 U.S. at 198.

This authority of the attending physician to make the abortion decision free from external interference was reaffirmed in *Planned Parenthood of Central Missouri v. Danforth, supra.*

> The State cannot delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester.
>
> "... the state does not have the constitutional authority to give a third party an absolute and possibly arbitrary veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."

49 L. Ed. 2d at 805 and 808.

The state claims, through the Affidavit of Harold McIntosh (A. 17-19) that the Department "accepts at face value" the certification of medical necessity. If this were so, it totally negates the existence of any state interest in the prior authorization requirement. If there is no reason to review the request for authorization in advance, then the statement can simply be sent in with a request for payment as is required for all other pregnancy-related care, and indeed for the vast majority of services.

When this litigation was pending, the appellant's literally dictated the proper language to use for approval of abortions. See Affidavit of Harriet Bograd. (A. 66-67) The state never questioned this language, and it gave telephone approval in some situations. It simply defies credibility for the state to assert that such a procedure serves its interest in assuring that only necessary services are reimbursed. This meaningless exercise can as well be engaged in after as before the service is performed.

The prior authorization requirement of necessity imposes a delay of at least one week and most often two weeks in the abortion process and is, thus, detrimental to maternal health rather than related to it. See Affidavit of Sandra Sereque (A. 39-40) in which she states that there is a time lapse of approximately two weeks between the time form W-601 is submitted and the day it is returned. All the physicians' affidavits indicated that time is crucial to a safe abortion and that one should be scheduled within days of the decision to terminate the pregnancy. Affidavits of James Kauders, M.D., (A. 29), Eugene Corley, M.D.,(A. 32-33 and A. at 61-62), Joseph Horowitz, M.D. (A. at 38 and A. at 57-59) and Gordon Jonas, M.D. (A. at 65). Both Dr. Corley and Dr. Jonas indicated that Medicaid recipients tended to wait until later in their pregnancies to consult a physician than other women. For Carol C. the two-week delay would have brought her within the 10th and more dangerous week of her pregnancy. Affidavit of Eugene Corley, M.D. (A. 32)

The District Court found that prior approval caused a delay in performing the abortion, despite the appellant's assertions to the contrary. The state also argued below that if delay were a problem, the physician could

simply telephone the proper authorities and obtain verbal prior authorization. Affidavit of Harold McIntosh, *supra.* Certainly the regulation gives no hint of the availability of this procedure. Mr. McIntosh also states that many other services require prior approval. He has never disputed the fact that no other obstetrical or short term hospital care, or in fact any other similar service, requires prior authorization.

The District Court was correct in looking to the face of the regulation in making its decision, rather than accepting the state's claim that it has no impact. The District Court for the Eastern District of New York has recently given short shrift to similar claims made before it.

> There is an indication that if physicians certify that the abortion is 'medically indicated', the certificates are not in practice questioned, but there can be no assurance that the covert practice will continue, when the State's official position continues to be what it is (cf *Bulluck v. Washington,* 1972, 152 VS App. D.C. 39, 468 F. 2d 1096), and moreover, such a dubious certification practice is, in any event, not a legally tolerable substitute for a final clarification of the validity of the Administrative Letter.

Klein v. Nassau County Medical Center, supra, 409 F. Supp. at 733.

C. Defendants Cannot Require Prior Submission of the Patient's Consent as a Condition for Reimbursement for Abortion

Appellees do not agree that *Danforth* validates the patient consent requirement in this case. *Danforth* holds constitutional a requirement that a patient consent in

advance, in writing, to an abortion. Connecticut goes further, and requires proof of prior written consent before it issues its prior authorization for an abortion. The state under *Danforth* may require proof that the consent was in fact given prior to the surgery. The problem with §275 is the requirement that the state actually review the validity of the consent beforehand. Like the entire prior authorization requirement there is a danger of delay, without any showing that a state interest is served by this demonstration of consent before, rather than after the procedure is performed.

Taken as a whole, Section 275 creates an "extra layer of restriction placed on abortion" *Word v. Poelker, supra* at 1332, which must fall, because it serves no compelling state interest and "unduly penalizes those patients who seek and those doctors who choose to perform abortions." *Id.* Neither health of the mother nor concern for the fetus, are served by denying medical assistance for abortion, or by surrounding the availability of medicaid funds with administrative requirements which deter or at best delay the necessary medical treatment.

Defendants have undertaken to provide medical care to all eligible medicaid recipients. They have then singled out that group of recipients requiring abortion and refused and restricted that particular form of care. Plaintiffs submit that fundamental constitutional guarantees require this Court to strike down the challenged policy and to require the payment of reasonable costs for abortion services. There is no ground of differences nor relationship to state interest that rationally explains the different treatment accorded poor women with respect to the availability of abortion services, as contrasted with pre-and postnatal services or

with other medical services reimbursable under the state's Medical Assistance Program.

CONCLUSION

For all of the foregoing reasons, Appellees respectfully request this court to affirm the decision of the United States District Court for the District of Connecticut enjoining the State of Connecticut from refusing medicaid payments for abortion which a woman, with her physician's concurrence, decides to undergo, and from imposing any requirement or condition upon abortion payments which is not imposed on payments for other pregnancy-related care.

Respectfully submitted,
SUSAN ROE, LINDA POE, and
the Class they represent.

BY THEIR ATTORNEYS

LUCY V. KATZ
Koskoff, Koskoff, Rutkin & Bieder
1241 Main Street
Bridgeport, CT 06604

KATHRYN EMMETT
Koskoff, Koskoff, Rutkin & Bieder
1241 Main Street
Bridgeport, CT 06604

CATHERINE RORABACK
265 Church Street
New Haven, CT 06511

ANN HILL
33 Whitney Avenue
New Haven, CT 06511